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Brent Statham Vince Engle, Appellees : Reply Brief**

Utah Supreme Court

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UTAH SUPREME COURT

GOLD'S GYM INTERNATIONAL, INC.,

Appellant,

vs.

CLARK CHAMBERLAIN and BRENT
STATHAM VINCE ENGLE,

Appellees.

**GOLD'S GYM INTERNATIONAL,
INC.'S REPLY BRIEF**

Appellate Case No. 20170146-SC

On Appeal from the Third Judicial District Court for Salt Lake County, State of Utah
Civil No. 090919785, Honorable T. M. SHAUGHNESSY

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I. INTRODUCTION

It is critical to note at the outset that Clark Chamberlain and Brent Statham (referred collectively herein as “**Appellees**”) did not challenge the substantive legal arguments raised by Gold’s Gym International, Inc. (“**Gold’s Gym**”) on appeal.¹ Rather, Chamberlain (Gold’s Gym refers to “Chamberlain” when referring to his response solely in his behalf on this appeal) merely asserts that one of Gold’s Gym’s arguments was argued for the first time in a Reply and should not be considered. Chamberlain overlooks that Gold’s Gym responded to an argument asserted by Appellees in the Memorandum in Opposition and thus Gold’s Gym’s argument is appropriate. Gold’s Gym respectfully requests this Court to rule in Gold’s Gym’s favor thereby reversing the trial court’s decision to deny Gold’s Gym’s attorneys’ fees and costs incurred in this litigation.

II. ARGUMENT & AUTHORITY

A. Appellees Do Not Challenge Gold’s Gym’s Substantive Legal Arguments Made on Appeal, and Thus, Chamberlain Has Abandoned the Right to Do So. Utah courts deem “arguments not addressed in an opposition to be abandoned.” *U.S. ex rel. Told v. Interwest Const. Co.*, 505 F. Supp. 2d 1245, 1251 (D. Utah 2007), *aff’d sub nom. Murphy v. McLaughlin*, No. 8:07-3023-RBH, 2008 WL 598113 (D.S.C. Feb. 28, 2008); *see Misner v. Potter*, No. 2:07-CV-330 TS, 2008 WL 410128, at *3 (D. Utah Feb. 12, 2008) (“Plaintiff concedes this point by his failure to address it in his opposition brief.”).

¹ Brent Statham has not filed an Appellee Brief.

In this case, Appellees have abandoned the substantive legal arguments on appeal (as opposed to mere procedural ones addressed in detail *supra*) because they failed to address any of the substantive legal arguments made by Gold's Gym in the Appellate Brief. The Appellees employed a risky strategy by electing to merely attack this appeal on procedural grounds, namely that Gold's Gym did not preserve certain issues below. The Appellees did not, however, attempt to remotely address Gold's Gym's following substantive legal arguments on appeal:

(1) The Appellees are liable for attorneys fees related to Gold's Gym Motion to dismiss the contract claim under the License Agreement that Appellees asserted and the court dismissed;

(2) The Appellees cannot avoid the obligations of the License Agreement (*i.e.* the attorneys' fee provision) when they have sought the benefits therefrom (*i.e.* bringing a contract claim on behalf of the Company and all of the remaining claims are related to and arise out of the contract) throughout the entirety of litigation; *see Richardson v. Rupper*, 2014 UT App 11, ¶ 11, 318 P.3d 1218, 1221 "[a] party cannot accept the benefits of a contract and reject its burdens.";

(3) The Appellees are estopped from arguing on appeal that they are not parties to the License Agreement when they have consistently represented that they brought their claims on behalf of the Company. *See Wohnoutka v. Kelley*, 2014 UT App 154, ¶ 2, 330 P.3d 762, 764 ("[E]stoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a

position [it has] previously taken.”) (citations omitted); *see also Zeese v. Siegel’s Estate*, 534 P.2d 85, 89 (Utah 1975) (“For a period of four years plaintiffs dealt with defendant as the lessee, they are estopped by this conduct to take the inconsistent position that defendant did not have a leasehold interest.”);

(3) The Appellees’ tort claims arise out of and relate to the License Agreement, and therefore, Gold’s Gym can recover attorneys’ fees for successfully defending against these claims;

(4) The Appellees’ claims are derivative on behalf of the Company thereby subjecting them to attorneys’ fees and costs under the License Agreement, which they unsuccessfully sought to enforce on behalf of the Company against Gold’s Gym;

(4) The Appellees’ claims are derivative and they do not fall within the closely-held corporation exception; and

(5) Gold’s Gym’s attorneys’ fees are reasonable (without respect to the attorneys’ fees incurred for filing the summary judgment motions, which is the singular and limited basis upon which Chamberlain challenges the reasonableness of fees).

Therefore, the foregoing legal arguments are abandoned by The Appellees because they have conceded the legal merits thereof by electing to not oppose them in his Appellee Brief. Based upon the aforementioned grounds, Gold’s Gym respectfully

requests this Court to reverse the trial court's decision denying Gold's Gym's attorneys' fees and costs.

B. In its Reply Memorandum in Support of the Motion for Fees, Gold's Gym Responded to an Issue – *Raised for the Very First Time in this Case* – By Appellees in Their Opposition to the Motion. Chamberlain's only argument in appeal is that Gold's Gym raised the issue that Appellees asserted derivative claims for the first time in its Reply in Support of its Motion for Attorneys Fees in the trial court. However, from the commencement of this action, Appellees claimed to stand in the shoes of the Company by asserting claims arising under the License Agreement on behalf of the Company. Then, as soon as Gold's Gym defeated all of Appellees' claims at trial and brought a motion seeking attorneys' fees, Chamberlain shifted positions and – *for the very first time in this case* – argued that he is not a party to the contract on which he based his claims on behalf of the Company against Gold's Gym. Gold's Gym is not required to anticipate in its Memorandum in Support every defense or legal argument an opposing party could make in an opposition memorandum to a motion it files – especially one that for the first time radically changes the position taken by a party throughout the entire case. The Utah Rules of Civil and Appellate Procedure allow parties to submit a reply memorandum rebutting arguments that are newly asserted theories in an opposition to a motion. Contrary to what Chamberlain claims, Gold's Gym is not barred from addressing in a reply memorandum a newly raised legal issue in an opposition memorandum to a motion. This is precisely what happened in this case and Gold's Gym is permitted to do so under Utah law.

Like trial courts, the Utah appellate Courts provide the following guidelines regarding preservation of issues. “Generally, issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court.” *Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540, 545. “This is to prevent the resulting unfairness to the respondent if an argument or issue was first raised in the reply brief and the respondent had no opportunity to respond.” *Id.*

“However, fairness to the respondent is not a concern if it is the respondent who first raises an issue in the opposing brief. In fact, our appellate rules expressly direct an appellant to “answer[] any new matter set forth in the opposing brief.” Id. at ¶ 24, 16 P.3d at 545 (quoting Utah R.App.P. 24(c) (emphasis added). See also Utah R. Civ. P. 7(e)(1) (“[T]he moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion.”) (emphasis added). “Therefore, if an appellant responds in the reply brief to a new issue raised by the appellee in its opposing brief, the issue is not waived. This is also generally the rule with other courts that have considered this issue.” Brown, 2000 UT 89, ¶ 24, 16 P.3d at 545 (emphasis added).

In their opposition to Gold’s Gym’s Motion for attorneys fees, the Appellees argued:

Thus, the plaintiffs, as members of HSSG, would not be personally liable, even if there were a basis to award fees against HSSG under the Licensing Agreement. Gold’s is aware that neither Chamberlain nor Statham were parties to the License Agreement. Gold’s has repeatedly insisted that the plaintiffs lack standing on that ground.

Id.

In addition, the Appellees admitted in their Memorandum in Opposition to Gold's Gym's Motion for Fees below that: "Chamberlain and Statham brought claims against Gold's for claims arising out of or in connection with the *License Agreement*, not the Guaranty." (Memo. in Opp. at 6) Even though they claimed and admitted that their personal claims "arose out of" and "in connection with" the License Agreement, they argued in the Opposition that: "[T]he court should deny Gold's request for attorneys fees because (i) the Plaintiffs are not parties to the License Agreement and are not personally liable for the obligations of HSSG...." (*Id.*)

Gold's Gym's Reply memorandum in support of its Motion directly responded to these arguments by arguing that the Appellees' claims could only have been derivative claims asserted in behalf of Health Source of St. George, LLC. Gold's Gym expressly stated the following in its reply memorandum:

This Court has consistently ruled that Plaintiffs asserted claims that arose only because they were parties to the License Agreement on behalf of Health Source of St. George, LLC ("Company").

See Gold's Reply to Motion, p.2. Gold's Gym even pointed out specific instances when Chamberlain argued in submitted papers to the trial court that he brought claims derivatively on behalf of the corporation.

For example, Plaintiffs' opposition memorandum provides that "***Plaintiffs' claims belong to*** them personally (for example, Gold's interfered with their individual relations with the other members of the LLC, as alleged in the previous section, and with their individual relations with the Provo Group) but also belong to ***Health Source LLC. Under controlling law, however, Plaintiffs are entitled to bring the claims personally on behalf of the LLC.***

See Chamberlain's 4-26-2017 Memo. in Opp. to Gold's Gym's Summary Judgment Motion, p.85 (emphasis added). To argue that the Derivative Issue was not preserved in the lower court is disingenuous at best because the Appellees argued that they were asserting claims based on rights created by the License Agreement on behalf of Health Service of St. George. However, for the very first time in this case, Appellees argued in their Opposition to the Motion for Attorneys Fees that Appellees were not parties to the License Agreement upon which they sued on behalf of the Company. Therefore, as a matter of Utah law and procedure, Gold's Gym was entitled to directly address in its Reply memorandum Appellees' new legal theory raised in their Opposition thereto.

C. Throughout the Duration of this Lawsuit, Gold's Gym Properly Preserved the Argument that the Appellees, Who are Members of the Company, Can Be Held Liable for Attorneys' Fees When Bringing Unsuccessful Claims on Behalf of the Company. Chamberlain argues that "Gold's failed to preserve any argument for why Chamberlain was liable for attorney fees under the License Agreement." (Appellee Brief, p.13). However, the *sole* reason for bringing the Motion for Attorneys' Fees and Costs (the "Motion") was to hold the individual members of the Company, including the Appellees, liable for bringing unsuccessful claims on behalf of the Company (referred herein as the "Derivative Issue").² To suggest otherwise neglects the legal proceedings and relentless arguments raised in the trial court. For the following reasons, Gold's Gym

² In addition to the Derivative Issue, Gold's Gym is entitled to attorneys' fees and costs based on the substantive arguments addressed in Section A of this Reply Brief, and to which Chamberlain does not respond. The only argument that Chamberlain claims was not properly preserved is the Derivative Issue.

preserved the Derivative Issue below and it is ripe for a decision before the Utah Supreme Court.

1. The Derivative Issue was Preserved and Even Ruled Upon By the Trial Court's September 6, 2013 Memorandum Decision. Gold's Gym preserved the Derivative Issue below by bringing a motion for summary judgment. In its denial of the summary judgment motion, the trial court entered in relevant part the following Memorandum Decision:

Gold's argues that the Complaint should be dismissed because the claims belong to the now-defunct Health Source, but Health Source was never a named party. *Gold's claims that the Complaint is a derivative action on behalf of Health Source, and the individual Plaintiffs lack standing.*

The Court must first determine whether this is a derivative action. Derivative suits seek to enforce rights belonging to the corporation. *Aurora Credit Serv. Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1276 (Utah 1998). In contrast, direct actions by members are appropriate where "the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action." *Id.* The Court is not convinced that this is a derivative suit. First, the Utah Supreme Court has noted that derivative actions may not be required where the corporation is closely held with a limited number of principals. Here, the claims are brought by two of the three remaining members of Health Source; clearly, Health Source was closely held with a very limited number of principals. Second, derivative actions are alleged against the corporation itself. Here, Gold's is challenging the claims against Gold's, not Health Source or Mr. Engle. Gold's does not cite to authority requiring a derivative suit for claims against a party who is not the primary corporation.

Plaintiffs Clark Chamberlain and Brent Statham are not improper parties, and Gold's has not shown that this is a derivative action of the sort that would require Health Source to be named a Plaintiff.

See September 6, 2013 Memorandum Decision re: Gold's Summary Judgment Motion, p.13-14 (internal footnotes omitted) (emphasis added). Gold's Gym preserved the

Derivative Issue in the trial court as demonstrated by the trial court's Order. The Derivative Issue is, therefore, properly before this Court. It is critical to note that because the lower court denied Gold's Gym summary judgment motion on the Derivative Issue, the case proceeded forward with the Appellees permitted to bring all of their claims on behalf of the Company.³ Therefore, the only reason the Appellees were permitted to pursue legal relief from Gold's Gym was because the Derivative Issue survived a summary judgment motion.

2. Gold's Gym's Motion to Dismiss Preserved the Derivative Issue. It is undisputed that Chamberlain brought a contract claim on behalf of the Company against Gold's Gym. In addition, all of the claims that moved forward relied upon rights arising from the License Agreement. What is at issue on this appeal is whether Gold's Gym can recover attorneys fees because the Appellees brought unsuccessful claims against Gold's Gym that rely on a contract that has an attorneys fee provision. Although Gold's Gym did not expressly call the claims, "derivative", in its Reply memorandum regarding the fees motion, it was the underlying legal theory of its Motion for Fees. Chamberlain asserts a mere semantic distinction without a difference because Gold's explained that it is entitled

³ In his response to Gold's Gym's summary judgment motion relating to the Derivative Issue, Chamberlain argued as follows: "*Plaintiffs' claims belong to them personally (for example, Gold's interfered with their individual relations with the other members of the LLC, as alleged in the previous section, and with their individual relations with the Provo Group) but also belong to Health Source LLC. Under controlling law, however, Plaintiffs are entitled to bring the claims personally on behalf of the LLC. See Chamberlain's 4-26-2017 Memo. in Opp. to Gold's Gym's Summary Judgment Motion, p.85 (emphasis added).* Chamberlain has been arguing throughout this entire case that his claims belong to the Company. Thus, the Derivative Issue is properly preserved to be adjudicated in this Court.

to attorneys' fees because the Appellees based their claim on a contract that only the entity signed but for which they claimed the rights to enforce individually – thus describing the essence of a derivative claim. Rather, based on the previous rulings of the Trial Court, which allowed the Appellees to move forward on behalf of the Company even though they were never parties thereto, Gold's Gym's opening Motion departed from the fact that the trial court ruled that the Appellees could assert rights under the License Agreement.

In its Motion for Summary Judgement, Gold's Gym preserved the Derivative Issue by pointing out the trial court's relevant Findings of Fact and Conclusions of Law:

With respect to Plaintiffs' intentional interference with the License Agreement claim, this Court made the following statement in its Findings of Fact and Conclusions of Law: Insofar as Plaintiffs are asserting that Gold's Gym interfered with the License Agreement, or with a prospective Franchise Agreement, that claim fails because Gold's Gym was (or would have been) a party to those contracts and *Plaintiffs cannot sue Gold's Gym for interfering with a contract to which it is a party.*

See December 19, 2016 Findings of Fact and Conclusions of Law, p.29 (internal footnotes omitted) (emphasis added). Despite Chamberlain arguing that he was not a party to the License Agreement, even the lower court, when analyzing the Appellees' tortious interference claim, determined that they could assert the Company's claims under the contract. The trial court explicitly analyzed the effect of the Appellees bringing a contract claim derivatively on behalf of the Company. Although the underlying contract claim that the Appellees brought on behalf of the corporation was dismissed on a motion to dismiss, the Appellees derivatively pursued a breach of contract as the basis to support their other claims for tortious interference, conversion and civil conspiracy. The

Appellees expressly relied on the rights under the License Agreement to support the “improper means” element of its tortious interference with economic relations claim. The Appellees persisted in doing so even throughout the trial of the case. Gold’s Gym’s Motion provided:

Gold’s Gym was forced to defend a breach of contract claim all the way through trial (even though the breach of contract claim was dismissed with prejudice on Gold’s Gym’s Motion to Dismiss) because an intentional breach of the License Agreement with the purpose to inflict economic harm can serve as a basis for “improper means” to support an intentional interference claim.

See Motion, p.8. In addition, the Appellees claimed that the interest “converted” in their conversion claim was the License Agreement. The alleged conspiracy focused on converting the license interest created by the License Agreement. Gold’s Gym presented the Derivative Issue to the trial court, which also analyzed whether the Appellees were parties to the contract at least with respect to the Appellees’ tortious interference claim, as noted *supra*. Thus, Gold’s Gym’s Motion preserved the Derivative Issue.

3. Chamberlain’s Trial Court Opposition Memorandum to Gold’s Gym’s Motion for Attorney’s Fees Squarely Addressed the Derivative Issue. Chamberlain’s opening argument in its opposition memorandum to Gold’s Gym Motion was that the “attorney fee provision in the License Agreement does not apply to Chamberlain” because he is “not [a party thereto].” *See* Chamberlain’s Opp. to Motion, p.3. Although Gold’s Gym presented the Derivative Issue before the lower court at the summary judgment stage and again in its opening Motion, Chamberlain made this legal argument

the apex of its opposition. As such, Gold's Gym was entitled to respond accordingly.

Appellees stated in his opposition memorandum:

Thus, the plaintiffs, as members of HSSG, would not be personally liable, even if there were a basis to award fees against HSSG under the Licensing Agreement. Gold's is aware that neither Chamberlain nor Statham were parties to the License Agreement. Gold's has repeatedly insisted that the plaintiffs lack standing on that ground.

Id. Here, Chamberlain argues that even if he is permitted to pursue claims on behalf of the Company, he is not liable for attorneys' fees – in other words, Chamberlain admits that he asserts a derivative claim but describes it rather than using the term “derivative”. Chamberlain squarely addressed this issue in its opposition memorandum to Gold's Gym's Motion. *See Brown v. Glover*, 2000 UT 89, ¶¶ 23-25, 16 P.3d 540, 545–4611 (“In the instant case, when Brown appealed to the court of appeals she did not raise the issue of whether the trial court erred in granting summary judgment based on the merits of the summary judgment motion. Instead, she argued that the trial court erred in granting summary judgment in light of her pending discovery motions and before adequate discovery could take place. Chick-Fil-A responded in its opposing brief by raising the issue that summary judgment was properly granted because its food sampling was not an inherently dangerous activity. Then, in accordance with rule 24(c) of the Utah Rules of Appellate Procedure, Brown answered the new matter that was set forth in Chick-Fil-A's opposing brief. Therefore, the court of appeals should have considered Brown's argument that *Schnuphase* was not applicable but that *Canfield v. Albertsons, Inc.*, 841 P.2d 1224 (Utah Ct.App.1992), was controlling.”).

To argue that Chamberlain did not have an adequate opportunity to address the Derivative Issue is simply without merit because he took the opportunity to point this issue out to the trial court, which eventually agreed with his position that Chamberlain, a member of the Company, could not be held liable derivatively on claims brought on behalf of a Company merely because Chamberlain was not a party to the contract. Chamberlain expressly pointed out that the Derivative Issue is something Gold's Gym "has repeatedly insisted" to argue throughout this case. Thus, it is properly preserved.

4. Gold's Gym's Trial Court Reply Memorandum Responded to the Argument Made by Chamberlain that He Could Individually Assert Claims Under the License Agreement to Which He Was Not a Party, *i.e.* a Derivative Action. For brevity's sake, see Section B *supra*, which discusses in detail the Utah law and procedure upon which Gold's Gym relies to establish that it was entitled to address in its reply memorandum an issue that was raised for the very first time in this instance in Chamberlain's opposition to the Motion.

D. Gold's Gym Is Entitled to Challenge on Appeal a Prior Summary Judgment Ruling. Chamberlain claims that the Derivative Issue is "barred by Gold's failure to challenge the district court's prior rulings on that issue." *See* Appellee Brief, p.15. However, "[o]n appeal, we will review a district court's denial of a summary judgment motion when the district court makes a legal ruling based on undisputed facts that do not materially change at trial." *Normandeau v. Hanson Equip., Inc.*, 2009 UT 44, ¶ 9, 215 P.3d 152, 156. *See Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co.*, 844 P.2d 322, 326 (Utah 1992).

What Chamberlain fails to inform this Court is that Gold's Gym was placed at the mercy of the trial court, which allowed the Appellees to present this matter as a derivative action on behalf of the Company. The trial court's summary judgment denial of the Derivative Issue presented by Gold's Gym is central to Gold's Gym's position that it is now entitled for the attorneys' fees and costs incurred in this litigation for successfully defending the claims brought by the Appellees on behalf of the Company. The trial court's summary judgment denial was made on undisputed facts that did not materially change at trial, *i.e.* the Appellees consistently argued throughout this case that they were bringing their claims on behalf of the Company. The trial court's summary judgment denial is based purely on legal grounds, namely that the Appellees' claims are not derivative.

The two trial court orders (*i.e.* the Order denying summary judgment on the Derivative Issue and the Order denying Gold's Gym's attorneys' fees and costs) are intricately related to one another. Analyzing one without the other encompasses only half of the legal issue and mischaracterizes the legal proceedings below, which tactic conveniently benefits Chamberlain while substantially prejudices Gold's Gym. Put simply, Gold's Gym' is appealing the Order denying Gold's Gym's its attorneys' fees and costs, but because the Order relating to summary judgment is relevant, Gold's Gym highlights it into the legal analysis as well so that the Court is informed of the pertinent prior proceedings.

E. Contrary to What Chamberlain Asserts, Gold's Gym Relied Upon Utah Law in its Trial Court Reply Memorandum in Support of the Derivative Issue.

Chamberlain next argues that Gold's Gym did not provide any legal authority in its reply memorandum in support of the Derivative Issue. This is false. For example, Gold's Gym cited the following proposition related to the Derivative Issue: "[a] party cannot accept the benefits of a contract and reject its burdens." *Richardson v. Rupper*, 2014 UT App 11, ¶ 11, 318 P.3d 1218, 1221. *See* Reply Memo. in Supp. of Motion, p.4. This reference was made in the context of bringing claims derivatively on behalf of the Company. Gold's Gym relied on further Utah case law relating to estoppel: "estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position [it has] previously taken." *Wohnoutka v. Kelley*, 2014 UT App 154, ¶ 2, 330 P.3d 762, 764 (citations omitted). *See* Reply Memo. in Supp. of Motion, p.4. This argument too was related to the Derivative Issue, particularly because all along Chamberlain represented to the trial court that it was bringing this matter on behalf of the Company. Then, when faced with liability for attorneys' fees for litigating unsuccessful claims, Chamberlain asserted inconsistently that he was not a party to the contract. In fact, all of Gold's Gym's arguments were based on the Derivative Issue to recover attorneys' fees and costs under the License Agreement. The fact that Gold's Gym has found additional case law that supports the Derivative Issue on appeal does not invalidate the preservation of the issue below. Rather, the Derivative Issue was preserved throughout the lower court, as demonstrated herein, and any additional case law cited in support of the legal theory is permissible because the Derivative Issue was properly preserved in the trial court.

F. Contrary to What Chamberlain Asserts, Gold's Gym's Arguments on Appeal are the Same Raised Below. Chamberlain claims that the "argument that Gold's

set forth in the Reply in Support of Attorney Fees in not the same argument that it now makes on appeal.” See Chamberlain’s Appellee Brief, p.15. This assertion is inaccurate. As in its consistent position below, Gold’s Gym argues on appeal that Chamberlain cannot escape the obligations of the contract, such as paying attorneys’ fees and costs for bringing unsuccessful claims, particularly when he has used the contract’s benefits to its advantages and as a sword throughout litigation.

For example, in its Appellate Brief, Gold’s Gym argued as follows:

However, the Members cannot use litigation as a sword when it is advantageous but then utilize it as a shield to avoid fees. Because the Members elected to sue Gold’s Gym on behalf of HSSG, despite the Members not being signatories to the License Agreement, the Members assumed all of the risks and obligations thereunder, including the obligation to reimburse Gold’s Gym its reasonable attorneys’ fees.

See Gold’s Gym’s Appellate Brief, pp.37-38. Similarly, Gold’s Gym argued to the trial court as provided:

Under Utah law, “[a] party cannot accept the benefits of a contract and reject its burdens.” [citation omitted]. In this case, Plaintiffs cannot seek to enforce the License Agreement against Gold’s Gym, i.e. the benefits of a contract, and then reject the liability that comes thereunder, i.e. the burdens of the contract such as the duty to pay attorneys’ fees if the party does not prevail. *From the commencement of this lawsuit, Plaintiffs have brought this action on behalf of and in the right of the Company in order to enforce the License Agreement against Gold’s Gym. However, now that each of their claims have been dismissed with prejudice, Plaintiffs attempt to reject the burdens of the License Agreement, namely the liability of attorneys’ fees incurred on behalf of the prevailing party in this action, which is Gold’s Gym. Therefore, Plaintiffs must accept both the benefits and burdens of the License Agreement and should not be allowed to circumvent their contractual obligations.*

See Reply Memo. in Supp. of Motion, p.4 (emphasis added). Therefore, Chamberlain’s claim that the Derivative Issue was not raised below is meritless.

G. Chamberlain Only Narrowly Challenged the Reasonableness of Gold's Gym's Attorneys' Fees, and Should Be Barred from Challenging the Reasonableness of the Attorneys' Fees Any Further on Appeal or Below, If Remanded. Chamberlain argues that the "reasonableness of [Gold's Gym's] fees were never addressed by the district court." *See* Appellee Brief, p.19. Although the trial court did not engage in an analysis of Gold's Gym's attorneys' fees, Chamberlain only narrowly challenged the reasonableness of such. As a result, and as outlined *infra*, Chamberlain should only be permitted to attack Gold's Gym's attorneys' fees as it already once did in the trial court. Chamberlain should not be granted a second bite of the apple.

In this case, Chamberlain only attacked the reasonableness of Gold's Gym's attorneys' fees with respect to the amount incurred for filing two summary judgment motions and a respective motion to reconsider. *See* Chamberlain's Memo. in Opp. to Motion, pp.7-12. Chamberlain did not challenge, on any other ground or basis, the reasonableness of Gold's Gym's attorneys' fees. For example, Chamberlain did *not* challenge that Gold's Gym's was entitled to attorneys' fees and costs for, inter alia, (1) the motion to dismiss with respect to the contract claim; (2) discovery and related motions; (3) pre-trial and trial preparation; and (4) post-trial motions. Therefore, in the event this Court remands this matter to the trial court to determine the reasonableness of Gold's Gym's attorneys' fees and costs incurred in this action, Chamberlain should be limited to what he legitimately raised below.

H. Gold's Gym is Not Estopped Because the "Related To" and "Arising From" Arguments for the purposes of the Motion to Dismiss Relating to the Statute of Limitations Are Separate and Distinct Issues from Whether the Attorneys Fees "Arise From" and "Relate To" the License Agreement. Chamberlain argues that "Gold's is estopped from claiming that Chamberlain's conversion, interference, and conspiracy claims arose from or were related to the License Agreement because, earlier in the proceedings in the district court, Gold's successfully argued that Chamberlain's breach of contract claim did not arise from and was not related to the same transaction or occurrence as the conversion, interference, and conspiracy claims." *See* Appellee Brief, p.17. This assertion is meritless for several reasons.

First, Chamberlain is confusing issues. The "related to" and "arising from" arguments employed by both parties for purposes of the motion to dismiss dealt with whether the claims were related for notice purposes related to the statute of limitations. No discovery had been conducted by either party. The facts had simply not been developed; neither were the respective legal arguments beyond infancy.

Second, and most importantly, the "related to" and "arising from" arguments raised at the motion to dismiss stage were limited only to the statute of limitations – not to the License Agreement with respect to the attorneys' fee provision therein. Gold's argued that the Plaintiffs' claims did not relate back to claims previously asserted for purposes of the statute of limitations analysis. That analysis focused on whether the contract and negligence claims that were dismissed had been implicitly asserted in the claims that were alleged in the prior complaint. They were not. However, that is a very

different analysis from determining whether the Plaintiffs' claims that were previously asserted in effect assert claims under the License Agreement. The attorneys' fee provision in the License Agreement was never raised at the motion to dismiss stage. Therefore, the "related to" and "arising from" arguments were vastly differently situated and Chamberlain's estoppel argument fails.

III. CONCLUSION – Rule 24(a) (10) U.R.A.P.

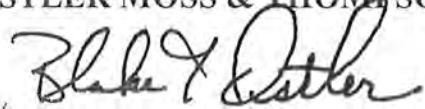
For the a reasons set forth above, Gold's Gym respectfully requests this Court to reverse the trial court's order denying Gold's Gym the right to attorneys' fees, and to award Gold's Gym its reasonable attorneys' fees and costs incurred throughout the duration of this lawsuit.

CERTIFICATE OF COMPLIANCE – Rule 24(a) (11) U.R.A.P.

I certify that in compliance with U.R.A.P. 24(a) (11), this brief contains 5,244 words, excluding the Table of Contents, Table of Authorities, and addenda. I relied on my word processor to obtain the count, which is Microsoft Word. I further certify that this brief has been prepared in a proportionally spaced typeface using Microsoft Word in compliance with Utah R. App. P. 27(b). I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

RESPECTFULLY SUBMITTED this 19th day of June, 2018.

OSTLER MOSS & THOMPSON


/s/

By: Blake T. Ostler
*Attorney for Gold's Gym
International, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2018, I caused to be served by the method indicated below a true and correct copy of the foregoing **GOLD'S GYM INTERNATIONAL, INC.'S REPLY APPEAL** on the following:

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